Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	MB Docket No. 12-68
Revision of the Commission's	)	
Program Access Rules	)	

COMMENTS OF
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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The National Cable & Telecommunications Association ("NCTA")[1] hereby submits its comments on the Further Notice of Proposed Rulemaking ("Further Notice") in the above-captioned proceeding.[2]

INTRODUCTION AND SUMMARY

In its Report and Order accompanying the Further Notice, the Commission determined that its rule prohibiting exclusive contracts between cable-affiliated satellite-delivered program networks and cable operators was no longer "necessary to preserve and protect competition and diversity in the distribution of video programming." Therefore, the prohibition, which had twice previously been extended by the Commission, was finally allowed to sunset as mandated by Section 628(c)(5) of the Communications Act, as amended, 47 U.S.C. §548(c)(5). The Commission made clear that exclusive contracts could still be found unlawful under the general provisions of Section 628(b), but only if a complaining multichannel video programming

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[1] NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation's largest provider of broadband service after investing over $185 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to more than 23 million customers.

[2] *See In re Revision of the Commission's Program Access Rules,* Further Notice of Proposed Rulemaking, 27 FCC Rcd 12605 (2012) ("Further Notice").

distributor ("MVPD") could demonstrate, on a case-by-case basis, that such a contract was "unfair" and had the "purpose or effect" of "significantly hindering or preventing" the complainant from providing satellite cable programming.

DBS providers, telephone companies and other MVPDs who had benefited for 20 years from the prohibition fought to the bitter end for yet another extension of the sunset. But at the eleventh hour, apparently sensing that the *per se* ban was about to end, a group of these competitors – the Coalition for Competitive Access to Content" ("CA2C") – proposed that if the Commission were to allow the prohibition to sunset, it should adopt a series of rebuttable presumptions in favor of complainants in case-by-case program access proceedings.

In a separate proceeding, the Commission had already adopted one such presumption with respect to terrestrially-delivered regional sports networks ("RSNs"). The Commission concluded that RSNs were sufficiently unique, "non-replicable," and important to MVPD competition that it was reasonable to presume that exclusive contracts between a cable-owned RSN and a cable operator would "hinder significantly" the ability of other MVPDs in the region to compete. RSNs can rebut this presumption in individual cases by providing evidence that the exclusive contract did not, in fact, significantly hinder competing MVPDs. And once an RSN proffers such evidence, the complainant bears the burden of persuading the Commission that the contract harmed competition *and* was "unfair."

CA2C urged the Commission not only to extend this rebuttable presumption of significant competitive harm to exclusive contracts between cable operators and cable-owned *satellite*-delivered RSNs – which the Commission had itself proposed – but also to adopt a presumption that such contracts were also "unfair." It also sought to extend the presumptions of harm and unfairness to exclusive contracts involving cable-owned *national* sports networks, as

well as other "popular, cable-affiliated programming networks (such as the 20 with the highest ratings according to national ratings services)." It asked that once a network's exclusive contract with a cable operator has been found to have violated Section 628, any *other* exclusive contracts entered into by that network also be presumed unlawful. And, finally, it argued that any time an MVPD challenges an exclusive contract between an RSN and a cable operator that effectively precludes the renewal of that MVPD's existing contract with the RSN, there should be a rebuttable presumption that the MVPD is entitled to a standstill order keeping its existing contract in place during the pendency of the complaint proceeding.

The Commission agreed to extend the same rebuttable presumption that it had previously established regarding exclusive contracts with terrestrially-delivered RSNs to satellite-delivered RSNs. But it declined to adopt any of the other presumptions urged by CA2C and instead sought comment on those presumptions in the Further Notice. As we explain below, there is no basis for adopting any of them.

As a matter of law, the Commission's authority to adopt presumptions in administrative proceedings is limited. As a threshold matter, such presumptions only "shift the burden of production and not the burden of persuasion."[3] And, in any event, they are permissible only "if there is a sound and rational connection between the proved and inferred facts," and only "when proof of one fact renders the existence of another fact *so probable* that it is sensible and timesaving to assume the truth of [the inferred] fact . . . until the adversary disproves it."[4] The presumptions proposed in the Further Notice rest on no such rational connection between the proved and the inferred facts. In other words, there is no reason to believe that exclusive contracts in any of the proposed situations would either be "unfair" or likely to significantly

[3] *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 716 (D.C. Cir. 2011).

[4] *Id., quoting Nat'l Mining Ass'n v. Dep't of Interior*, 177 F.3d 1, 6 (D.C. Cir. 1999) (emphasis added).

hinder competition – much less that any such effects would be so probable that they should be assumed to be the case until proven otherwise.

Moreover, as a matter of policy, it would make no sense to encourage and facilitate the filing of program access complaints without requiring any showing that an exclusive contract is either unfair or has any substantial deleterious effect on competition in the particular circumstances at issue. Nor is it justifiable to impose on defendant program networks the burden of providing evidence that a particular contract does *not* unfairly or significantly hinder competition before there is any evidence that it *does.* The exclusivity prohibition in Section 628(c) generally imposed such a burden. It embodied presumptions that exclusive contracts were unfair and significantly hindered competition unless the network could show that exclusivity was in the public interest. But the Commission found that, because of changes in the video marketplace, such a prohibition was no longer warranted,[5] and would "sweep[] too broadly."[6] Those marketplace characteristics substantially diminish – if not eliminate – the likelihood that any particular network is, in fact, a "must have" network for any particular MVPD in any particular circumstances.

Indeed, the change in marketplace circumstances that led to the elimination of the exclusivity ban should lead, if anything, to a presumption, in case-by-case complaint proceedings, that an exclusive contract is *not* anticompetitive. Even assuming *arguendo* that exclusivity with respect to some particular network might, in some particular circumstance, be unfair and significantly hinder an MVPD from competing, the complainant should bear the burden of presenting evidence that this is the case before imposing the burdensome costs and

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5 Further Notice, ¶ 33.

6 *Id.*, ¶ 2.

procedures of evidence production, discovery and an administrative proceeding on a cable program network.

The presumptions suggested by CA2C amount to a set of short-cuts that would enable an MVPD to prosecute a program access complaint without having to provide a shred of evidence that a particular exclusive contract is unfair and has significantly hindered its ability to compete in the provision of video programming. In essence, CA2C seeks to recreate the regulatory advantages it enjoyed under the *per se* ban regime even after the Commission opted for a case-by-case approach. The Commission should reject CA2C's proposal in its entirety.

I. THERE IS NO BASIS FOR PRESUMING THAT EXCLUSIVE CONTRACTS INVOLVING CABLE-AFFILIATED RSNs ARE "UNFAIR."

Although the Commission has already established a rebuttable presumption that exclusive contracts involving cable-affiliated RSNs significantly hinder the ability of a complaining MVPD to compete, there is no basis for presuming that such an effect on competitors is "unfair." As the D.C. Circuit made clear, the latter presumption does not obviously follow from the former. While the court deferred to the Commission's reliance on economic studies and data, including regression analyses, to justify a rebuttable presumption that exclusive contracts with terrestrially-delivered cable-affiliated RSNs hindered competitors' ability to provide video programming, it rejected as arbitrary and capricious the determination that such contracts were unfair.

The problem is that the mere fact that exclusivity may have an adverse effect on a competitor does not mean that such exclusivity is unfair. The court recognized "the generally accepted view in antitrust and other areas that exclusive contracts may have both procompetitive and anticompetitive effects," and explained that

> [h]ere, for example, 'the ability to enter into exclusive contracts could create economic incentives to invest in the development of new programming' by

> allowing a vertically integrated cable operator to differentiate its service and secure the benefits of creating and promoting its programming networks. . . . Indeed, the Commission itself has recognized that exclusivity can further competition in certain circumstances.[7]

Even the rules mandated by Section 628(c) – which the Commission found to be no longer necessary to protect competition – recognized and permitted exclusive contracts that were procompetitive and served the public interest.

When Section 628 was enacted two decades ago, cable operators faced little significant local competition from alternative MVPDs. The two national DBS services had not yet been launched, and telephone companies were not yet allowed to provide video programming in their telephone service areas. Moreover, because the channel capacity of cable systems was far smaller than it is today, there were far fewer cable program networks in existence, and a substantial portion of the most popular networks were owned or controlled by cable operators. Congress feared that if those networks granted exclusivity to cable operators, DBS and other alternative competitors might never get off the ground and consumers might never get the benefits of a competitive MVPD marketplace.

But the likelihood that exclusivity will have such an effect has substantially, if not entirely, disappeared now that competition has firmly and irreversibly taken hold in the MVPD marketplace. Even if it were the case that a particular program network were so important to so many viewers that its exclusive availability to a cable operator caused competitors such as the DBS providers and telephone companies to lose a significant number of customers, it would no longer be reasonable to assume that such an outcome is unfair, as those competitors likely possess the wherewithal to withstand such a competitive effect and to respond with unique and attractive product enhancements of their own to win those customers back. Indeed, where such

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[7] *Cablevision Sys. Corp. v. FCC*, 649 F. 3d at 721.

sturdy and vibrant competition exists, it is more likely that the procompetitive effects of exclusivity will prevail and consumers will benefit.

The Commission has found that, because of the specific nature of RSN programming, exclusive contracts involving RSNs are sufficiently likely to impact subscribership as to warrant a rebuttable presumption that they will significantly hinder competitors. But the entrenchment of competition in the video marketplace makes it no longer reasonable to presume in all cases that any such competitive effect will be unfair. There may be exceptional cases in which, because of unique characteristics of the local marketplace, the effect of a particular exclusive contract may be unfair. But the occurrence of such circumstances is improbable – and, in any case, is not "so probable that it is sensible and timesaving" – and permissible – to presume their occurrence in case-by-case adjudications.

II. THERE IS NO BASIS FOR ADOPTING A PRESUMPTION THAT EXCLUSIVE CONTRACTS INVOLVING CABLE-OWNED *NATIONAL* SPORTS NETWORKS UNFAIRLY OR SIGNIFICANTLY HINDER THE ABILITY OF MVPDS TO COMPETE.

Although the Commission has established a rebuttable presumption that exclusive contracts with cable-owned *regional* sports networks significantly hinder the ability of other MVPDs to compete, there is no basis for extending a similar presumption to *national* sports networks. The rationale for the RSN presumption has no applicability to national sports networks; there is no reason to believe that exclusive contracts with national sports networks would be so likely to hinder competitors that it would make sense to presume such an effect. And there certainly is no evidence to support either a presumption of unfairness or of significant hindrance.

The RSN presumption of significant hindrance was based on the Commission's determination that the regional sports teams whose games are carried by RSNs are of such

interest to viewers in the region that the ability of any MVPD that is denied access to such networks to compete effectively in that market will be significantly hindered. Whether or not that rationale was reasonable, it obviously does not apply to national sports networks. National sports networks typically show games of some of the same major league sports leagues as are carried by RSNs. But the games they show are not limited to those of a particular team or region. They are games of general interest to sports fans, but there is no reason to expect them to be as unique and non-replicable as the Commission found RSNs to be. Indeed, there are multiple national networks carrying mixtures of sporting events of major league and college sports, none of which – in contrast to RSNs – are limited to, or carry, a substantial number of the games of a particular team.

While many program networks may have a devoted base of fans who might choose not to subscribe to an MVPD that did not carry that network, this does not mean that the number of such fans is, in any case, so large that non-carriage would be unfair or significantly hinder the MVPD's ability to compete. In any event, there certainly is no reason to suspect that *all* national sports networks have so many such fans as to warrant a presumption that exclusive contracts regarding such networks will, in fact, be unfair or significantly hinder competing MVPDs.

In the case of RSNs, the Commission based its presumption on specific evidence and economic analyses including a regression analysis. The D.C. Circuit found that, "despite its limitations," this evidence, along with other "compelling reasons" advanced by the Commission, was sufficient to warrant judicial deference to the Commission's expertise.[8] But there is no evidence to support a similar presumption regarding national sports networks or any other class of supposedly "must-have" networks – and a mere hunch is not sufficient. Indeed, in the absence

[8] *Id.* at 717.

of compelling evidence, a presumption that burdens particular networks based on their content would raise serious First Amendment problems.

Whether or not an exclusive contract with any particular network is unfair or significantly hinders a particular MVPD in particular circumstances is a matter that should be addressed and determined in case-by-case adjudications. And before the burdens of such adjudications are imposed on cable operators, cable-owned program networks, and the Commission, MVPD complainants should be required to present evidence that an exclusive contract is, in fact, unfair and significantly hinders their ability to compete.

III. THERE IS NO BASIS FOR PRESUMING THAT A COMPLAINANT CHALLENGING AN EXCLUSIVE CONTRACT INVOLVING A CABLE-AFFILIATED RSN IS ENTITLED TO A STANDSTILL.

Presumptions are particularly inappropriate with respect to the facts necessary to obtain a standstill in a program access proceeding. Standstills, like stays and preliminary injunctions, are extraordinary remedies, which alter the rights and duties of parties before those rights and duties have been finally adjudicated. Such injunctive relief is generally available only when a party demonstrates that it is justified by the unique circumstances of their case. Parties must typically demonstrate not only that they will suffer irreparable harm in the absence of a standstill, but also that they are likely to prevail on the merits and that the stay relief will not unduly harm the interests of others and the interest of the public. In the case of program access relief, the bar is particularly high because a standstill directly and adversely affects the First Amendment interests of program networks by compelling them to make their programming available to distributors with which they would otherwise choose not to deal.

For these reasons, parties seeking standstills should bear the burden of production of evidence *and* the burden of persuasion with respect to each of the factors necessary to obtain such relief. But wholly apart from the unique aspects of standstills that counsel against

presumptions, there is simply no basis for concluding that, in the case of RSN exclusive contracts, it is so likely that the factors will be met that a presumption in favor of a standstill is warranted. As discussed above, there is no basis for presuming that such contracts are generally unfair – and, since unfairness is an essential element of a Section 628 violation, there is no basis for presuming that an MVPD seeking a standstill is likely to prevail on the merits.

Moreover, even though the Commission has adopted a rebuttable presumption that an exclusive RSN contract will significantly hinder competitors, the extent – if any – to which any such hindrance would result in *irreparable* injury will depend on the particular circumstances of the case. How strong is the demand in a particular community for a particular RSN's programming? Demand for the games of a last-place hockey team in a southwestern city is unlikely to be as strong as demand for the games of a pennant contending baseball team in a city with a strong fan base. And how sturdy and established is the complainant MVPD? The two DBS providers (which have more subscribers nationwide than all but one cable company), and the two largest phone companies providing cable service (Verizon and AT&T) surely have the resources to counter an exclusive contract with unique programming and competitive enhancements of their own. There is no basis for presuming across the board that the harm suffered by an MVPD will be irreparable or that such harm will outweigh the harm – both financial and Constitutional – that a standstill will impose on the cable-affiliated RSN.

IV. THERE IS NO BASIS FOR A REBUTTABLE PRESUMPTION FOR PREVIOUSLY CHALLENGED EXCLUSIVE CONTRACTS.

The notion that if a particular exclusive contract between a cable-affiliated network and a cable operator has been found to violate Section 628 in particular circumstances, *any* exclusive contract between that network and *any* cable operator in *any* circumstances should subsequently be presumed to violate Section 628 makes no sense at all. Both elements of a Section 628(b)

violation – whether and to what extent the conduct at issue "significantly hinders" an MVPD competitor, and whether the conduct is "unfair" – are fact-specific. They both depend not only on the programming at issue but also on the particular MVPD competitor and on the particular circumstances of the localities involved.

Just because the Commission has determined that a particular exclusive contract for a cable-affiliated network in a particular market is unfair and significantly hinders a particular MVPD, it does not rationally follow that any other exclusive contract entered into by that network would be unfair and significantly hinder another MVPD (or even the same MVPD) in another (or even the same) market. The demand for the network's programming may vary from community to community. The competitive viability of MVPDs will vary among MVPDs and may also vary depending on marketplace circumstances in different communities.

If, in fact, the circumstances in a particular case closely resemble those in a previously adjudicated program access proceeding involving the same network, the complainant should have little difficulty presenting sufficient evidence to go forward with a complaint. And where the circumstances are different from the previously adjudicated proceeding, there is no basis for presuming that they are the same and shifting the burden of production to the network.

CONCLUSION

For the foregoing reasons, there is no basis for adopting *any* of the presumptions on which the Commission seeks comment.

Respectfully submitted,

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